

## A New Dawn for Arbitration in India?

### Introduction

As the role of India in the world's economy continues to grow, it is inevitable that the number of international commercial disputes involving Indian parties will increase. This presents a dilemma for many Japanese investors who wish to take advantage of business opportunities in India but are fearful of their capital being caught up in lengthy, unpredictable Indian court litigation.

In August 2009, the Indian Prime Minister, Manmohan Singh, conceded that "*India has to suffer the scourge of the world's largest backlog of cases*" - with the number totalling 31.18 million as at 30 June 2009.<sup>1</sup> For India, arbitration has therefore long been seen as the solution to resolving Indian-related disputes for commercial parties.

As far back as November 2005, the then US Treasury Secretary, John Snow, commented that India would be able to attract more long-term foreign capital if international investors had the comfort of a commercial arbitration system to turn to in contractual disputes. Mr. Snow called for the installation of an arbitration system to reduce the uncertainty about the timeframe for Indian dispute resolution.<sup>2</sup>

In this Newsletter, we discuss the launch of a London Court of International Arbitration centre in India (LCIA India) and a recent appeal decision in the Delhi High Court in which the intentions of the parties to arbitrate outside India were respected. These are both important and positive developments, but for Japanese investors, do they welcome in a new dawn for arbitration in India?

### Launch of a new LCIA centre in India

In April 2009, LCIA India was launched and is expected to be fully operational by the end of the year. It is the first independent centre outside of London in the LCIA's 116 year history.<sup>3</sup> The only other non-London centre is the LCIA's recent joint venture with the Dubai International Finance Centre, the DIFC LCIA Arbitration Centre.<sup>4</sup>

The LCIA is among the leading international arbitral institutions and has long been one of the most popular for India-related disputes: 7% of disputes filed under the Rules of the LCIA in each of 2007 and 2008 involved Indian parties. This popularity should now be set to increase with the launch of LCIA India. The procedural experience and predictability of LCIA arbitration will at the very least offer an attractive, institutional option to parties seeking a more efficient method of arbitrating in India.

Dominic Roughton, Official Representative of the LCIA in Japan, believes that the choice of India is a clear indication of the perceived importance of the jurisdiction and its need for an institutional arbitral centre. It is hoped that the LCIA India will fill a vacuum in a jurisdiction where the vast majority of arbitrations conducted are *ad hoc* arbitrations (i.e. conducted without the support of an arbitral institution).

India undoubtedly has a number of the key features that are necessary for arbitration to flourish at a domestic and international level. It is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") which provides a system for the international enforcement of arbitral

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<sup>1</sup> iGovernment, 17 August 2009, PM, Chief Justice Differ on Backlog of Cases. The article breaks the 31.18 million down as Supreme Court: 52,592; High Court: 4,017,956; and subordinate courts: 27,119,092

<sup>2</sup> Financial Times, 8 November 2005, Snow Calls for an Arbitration System in India

<sup>3</sup> LCIA website (www.lcia.org), News, The LCIA in India

<sup>4</sup> HS Japan Dispute Avoidance Newsletter of April 2008 discussed the DIFC LCIA Arbitration Centre and also provided a breakdown of the procedural stages to be followed in a LCIA arbitration

awards. In addition, the Indian Arbitration and Conciliation Act 1996 (the "Act") provides a legislative framework for the conduct of arbitration in the country based on the UNCITRAL Model Law which in turn forms the basis of arbitration laws in most of the world's leading arbitration centres.

Despite the existence of these key features, however, there will be many hurdles to be overcome. Much of the effectiveness of an arbitral seat depends on the willingness of the local, supervisory courts to support an independent arbitral process. In this regard, Indian courts have a reputation for interventionism in arbitrations which has unnerved many international investors.

### A Positive Development in Arbitration Case Law in India

On the issue of interventionism, in our Japan Dispute Avoidance Newsletter of October 2008, we reported that the Supreme Court of India had jeopardized confidence in the Indian arbitral process by expanding the grounds on which a foreign arbitral award may be challenged in India. The case in question was *Venture Global Engineering v Satyam Computer Services Limited*,<sup>5</sup> which concerned an application to set aside an arbitral award rendered in London.

In *Venture Global*, the Indian Supreme Court held that foreign awards may be challenged under Part 1 of the Act, unless the parties have specifically agreed otherwise; and in considering any such challenge, the Indian courts can set the award aside (on the grounds of public policy) if it contravenes any substantive provisions of Indian law or is patently illegal. This broad application of the Convention right to refuse to enforce an arbitral award on public policy grounds is far beyond the interpretation applied by the national courts of most Convention signatories.

However, a recent appeal decision in the Delhi High Court (the "Appellate Court") in *Max India Limited v General Binding Corporation*<sup>6</sup> has brought reason for optimism that the interventionist approach of the Indian courts towards arbitration may be shifting.

The case concerned a Singaporean law governed contract which provided for arbitration in Singapore under the rules of the Singapore International Arbitration Centre and for the Singaporean courts to otherwise have jurisdiction. A dispute having arisen, the Indian party applied to the Indian courts under the Act - rather than to the Singaporean courts - for an interim injunction against its US counterparty pending the constitution of an arbitral tribunal in Singapore.

The basis for the Indian party's application to the Indian courts was an earlier Indian Supreme Court decision, *Bhatia International v Bulk Trading SA*.<sup>7</sup> This provided that provisions of Part 1 of the Act - including Section 9 which enables Indian courts to grant interim measures where the assets relating to the dispute are located in India - were applicable to international commercial arbitrations, irrespective of whether the arbitration was to be held in India or elsewhere, unless the parties had specifically agreed to the contrary.<sup>8</sup>

In *Max India*, the Appellate Court upheld an earlier decision of the Delhi High Court and ruled that it should not grant the injunction sought. The Delhi High Court had found that there was a "manifest intention of the Agreement . . . to exclude the jurisdiction of the Indian Courts" as the parties had chosen Singaporean law, Singaporean arbitration and the Singaporean courts and "knew very well" that the jurisdiction of Part I of the Act had therefore been excluded.<sup>9</sup>

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<sup>5</sup> *Global Engineering v Satyam Computer Services Limited* (2008 4 SCC 190)

<sup>6</sup> *Max India Limited v General Binding Corporation* (FAO(OS) 193/2009)

<sup>7</sup> *Bhatia International v Bulk Trading SA* (2002 4 SCC 105)

<sup>8</sup> Global Arbitration Review, *The Asia Pacific Arbitration Review 2008*, India

<sup>9</sup> *Max India Limited v General Binding Corporation* (OMP 136/2009)

This case is noteworthy in that the Appellate Court resisted widening the application of Bhatia International and upheld the clear intention of parties to resolve their disputes in arbitration outside India without interference by the Indian courts. The judgment itself even includes a re-statement of the "*general principles on which arbitration is founded*", namely:-

1. *The object of arbitration is to ensure a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.*
2. *The parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.*
3. *Intervention of the courts should be restricted."*

It should be noted, however, that *Max India* is only a decision of the Appellate Court and is therefore only persuasive rather than binding, unless the Supreme Court or Parliament intervenes.<sup>10</sup>

## Practical Advice & Conclusion

To reduce the scope for intervention by the Indian courts, the practice remains to advise international investors to include in their India-related contracts arbitration clauses which provide for an arbitral seat outside India and also to expressly exclude the application of Part 1 of the Act. The express exclusion of Part 1 is recommended even when all the elements of an arbitration clause specify another law and jurisdiction besides that of India.<sup>11</sup>

The establishment of LCIA India as well as the court's ruling in *Max India* serve as two strong signals, however, that India is becoming a more arbitration-friendly venue and one in which Japanese investors may be able to place increased confidence in the future. As for whether they represent a new dawn for arbitration in India, only time will tell but we will certainly monitor developments with interest.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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<sup>10</sup> Global Arbitration Review, 16 September 2009, New Delhi Court Shuns Interventionism

<sup>11</sup> Further guidance on this issue is expected to be provided in LCIA India's paper that will address how it expects its arbitration rules to correlate with the provisions of the Act